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EXAMINER

HARDEE, JOHN R

ART UNIT	PAPER NUMBER
1751	19

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Please find below and/or attached an Office communication concerning this application or proceeding.



UNITED STATES DEPARTMENT OF COMMERCE  
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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Paper No. 19

Application Number: 09/463,675  
Filing Date: May 12, 2000  
Appellant(s): Behler et al.

Steven J. Trzaska  
For Appellant

**EXAMINER'S ANSWER**

**MAILED**

**JAN 31 2002**

**GROUP 1700**

This is in response to appellant's brief on appeal filed January 16, 2001.

**(1) *Real Party in Interest***

A statement identifying the real party in interest is contained in the brief.

**(2) *Related Appeals and Interferences***

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A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

**(3) *Status of Claims***

The statement of the status of the claims contained in the brief is correct.

**(4) *Status of Amendments After Final***

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) *Summary of Invention***

The summary of invention contained in the brief is correct.

**(6) *Issues***

The appellant's statement of the issues in the brief is essentially correct. Claims 15-20 were finally rejected over Weinelt et al., and claims 21-22 were finally rejected over Weinelt et al. In view of Severns et al.

**(7) *Grouping of Claims***

The rejection of claims 15-22 stand or fall together because appellant's brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 1.192(c)(7).

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**(8) *Claims Appealed***

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(9) *Prior Art of Record***

The following is a listing of the prior art of record relied upon in the rejection of claims under appeal.

5,880,086	WEINELT et al.	3-1999
5,531,910	SEVERNS et al.	7-1996

**(10) *Grounds of Rejection***

The following ground(s) of rejection are applicable to the appealed claims:

Claims 15-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Weinelt et al., US 5,880,086. The reference discloses laundry softener concentrates comprising 5-40% by weight of a cationic softening agent, 0.1-25% by weight of an ester of an acid of 1 to 22 carbons with a di-, tri- or tetrahydric alcohol of 2-10 carbons, 0-10% by weight of a nonionic dispersing agent, 0-20% by weight of a polyglycol and water (col. 1, lines 47+). Note that the preferred embodiments contain non-zero amounts of the nonionic dispersing agent and polyglycol. Suitable cationics include those in col. 2 and the top of col. 3. Particularly preferred esters include mixtures of esters XIII and XV depicted at the top of col. 4 (col. 4, lines 30-33). Ester XIII may be an ethoxylated fatty acid, and ester XV is a monoester of glycerol. This preferred mixture reads on applicant's glycerol-fatty acid monoester and applicant's elected nonionic emulsifier. Suitable

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glycols include polyethylene glycols of a weight average molecular weight of 400-1000. The exemplified compositions are emulsions or clear solutions. No viscosities or particle sizes are disclosed, but examples 4 and 5 are described as being "low-viscosity". Examiner takes the position that the person of ordinary skill in the surfactant art could reasonably infer the importance of minimizing viscosity based on this disclosure. Examiner takes the position that the recited particle size could be realized in the course of combining and emulsifying the disclosed ingredients, as is disclosed in the reference. This reference differs from the claimed subject matter in that it does not disclose a composition which exemplifies applicant's claims.

It would have been obvious at the time the invention was made to make such a composition, because this reference teaches that all of the ingredients recited by applicants are suitable for inclusion in a fabric softening composition. The person of ordinary skill in the surfactant art would expect the recited compositions to have properties similar to those compositions which are exemplified, absent a showing to the contrary.

In the case where the claimed ranges overlap or lie inside ranges disclosed by the prior art, a *prima facie* case of obviousness exists. *In re Wertheim*, 541 F.2d 257, 191 USPQ 90 (CCPA 1976); *In re Woodruff*, 919 F.2d 1575, 16 USPQ2d 1934 (Fed Cir. 1990).

Claims 21 and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Weinelt et al., US 5,880,086 in view of Severns et al., US 5,531,910. The disclosure of Weinelt is summarized above. Addition of glycerol is not disclosed. Severns discloses fabric softening composition comprising a diesterquat cationic softener (col. 7, lines 58+). Compositions may

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further comprise glycerol monoesters (col. 22, lines 62+) and nonionic surfactants (col. 17, lines 10+). Addition of liquid carriers, which are principally water, is disclosed at col. 19, lines 22+. Carriers may further comprise low molecular weight alcohols, such as glycerol (col. 17, lines 55-56). It would have been obvious at the time the invention was made to add glycerol to the composition of Weinelt, because Weinelt discloses at col. 5, lines 7-8 that solubilizing agents may be added, and Severns teaches that glycerol is a useful carrier for aqueous softening compositions comprising cationic and nonionic surfactants.

The data in applicant's specification have been carefully considered, but they are not considered to demonstrate unexpected results commensurate in scope with the claims because data for the elected nonionic emulsifier are not presented.

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**(11) Response to Argument**

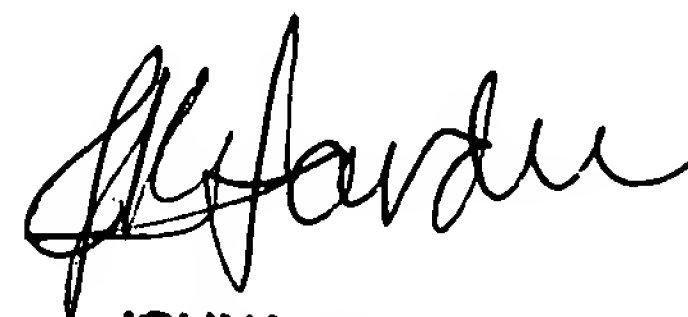
Appellant argues that the Weinelt reference discloses that the use of a nonionic surfactant and a glycol are optional, that there is no suggestion in the reference to use both, and that there is no suggestion to use both in the ratio recited by appellant. This is not persuasive because in the preferred embodiments, both the nonionic and the glycol are present, the nonionic at 0.5% to 5% by weight and the glycol at 0.5% to 10% by weight (col. 1, lines 57-60). The ratio recited by appellant is sufficiently broad that combining these ingredients in *random* amounts within the preferred ranges would afford a better than even chance of making a composition which meets appellant's ratio. Indeed, a combination at the low end of the preferred ranges, 0.5% of each, meets the recited ratio; as does a combination at the middle, 2.75% of nonionic and 5.25% of glycol; as does a combination at the high end, 5% of nonionic and 10% of glycol. This amounts to a high expectation of success.

Appellant's arguments regarding the combination rejection are directed to the perceived inadequacy of the Weinelt reference in meeting the recited ratio of nonionic to glycol. Again, the examiner has demonstrated that it would be easier to *meet* the recited ratio than to *avoid* it, simply by combining random amounts of nonionic and glycol within the percentages taught by the reference.

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For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



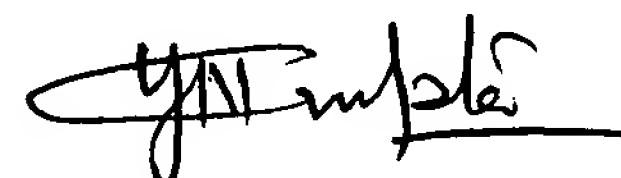
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